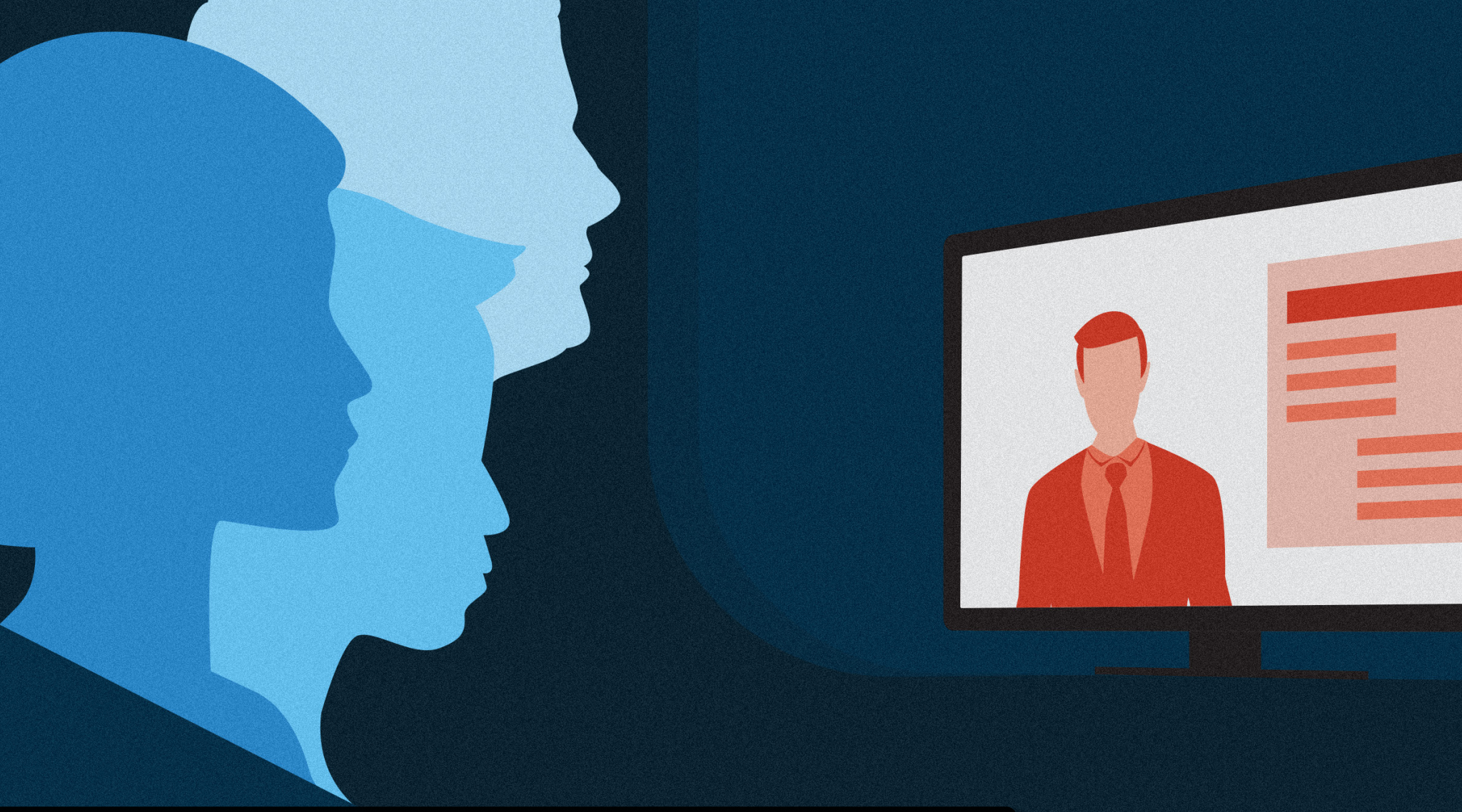

Bill C-11

A Fatally Flawed Gateway to Government Censorship

Jay Goldberg: Author

Canadian Taxpayers Federation

SEPTEMBER 2022

Canadian Taxpayers Federation

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About the Canadian Taxpayers Federation

The Canadian Taxpayers Federation is a federally incorporated, not-for-profit citizens' group dedicated to lower taxes, less waste and accountable government.

The CTF was founded in Saskatchewan in 1990 when the Association of Saskatchewan Taxpayers and the Resolution One Association of Alberta joined forces to create a national organization. At the end of 2020, the CTF had over 235,000 supporters nationwide.

The CTF maintains a federal office in Ottawa and regional offices in British Columbia, Alberta, Prairie (Saskatchewan and Manitoba), Ontario, Québec and Atlantic Canada. Regional offices conduct research and advocacy activities specific to their provinces in addition to acting as regional organizers of Canada-wide initiatives.

CTF offices field hundreds of media interviews each month, hold press conferences and issue regular news releases, commentaries, online postings and publications to advocate on behalf of CTF supporters. CTF representatives speak at functions, make presentations to government, meet with politicians and organize petition drives, events and campaigns to mobilize citizens to effect public policy change.

Any Canadian taxpayer committed to the CTF's mission is welcome to join at no cost and receive emailed Action Updates. Financial supporters can additionally receive the CTF's flagship publication The Taxpayer magazine, published three times a year.

The CTF is independent of any institutional or partisan affiliations. All CTF staff, board members and representatives are prohibited from donating to or holding a membership in any political party. In 2019-20, the CTF raised $4.8 million on the strength of 39,792 donations. Donations to the CTF are not tax deductible as a charitable contribution.

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Foreword

The government wants the power to regulate the internet. It wants to make it easier or harder for you to find content based on whether the government views the content as Canadian. The government says it will use the new powers it seek through Bill C-11 to make sure Canadian content shows up more prominently, but allowing the government to filter what we see and share online could be a dangerous gateway to government censorship.

Through Bill C-11, the government proposes to give these new regulatory powers to the Canadian Radio and Telecommunications Commission (CRTC). It would be up to the CRTC to decide what content qualifies as Canadian, with content being made more or less accessible online based on that standard.

Until now, Canadians have been against the idea of the government regulating the internet, other than to enforce laws that target criminal activity, such as terrorism or child pornography. Bill C-11 is not about criminality – it is about empowering bureaucrats to play a role in deciding what comes up and what gets buried on Canadians' social media feeds and streaming platforms. Many rightly question whether the government is even competent enough to decide what should be considered to be Canadian content. As of now, the legislation gives the CRTC the power to regulate the internet, with rules and instructions about how far the CRTC should go in regulating the internet to follow only after Bill C-11 is passed into law. That's asking for a lot of trust from Canadians.

Bill C-11 would impact Canadians' ability to hold the government to account. If the government has the power to filter and prioritize what Canadians are able to see and share online, the risk is that the government could use its new regulatory power to bury unfavourable content and promote content that is friendlier to the government. This raises very serious accountability issues.

The Canadian Taxpayers Federation's core mission is to advocate for lower taxes, less waste and more accountable government. Bill C-11 would make government less accountable, which is why the CTF is putting out an eBook outlining the dangers of the government's censorship legislation.

This eBook contains several components.

First, it includes four newspaper columns written by the CTF's Ontario Director, Jay Goldberg, outlining the pitfalls of the government's censorship efforts.

Second, it includes the testimony Goldberg gave before the House of Commons Standing Committee on Canadian Heritage outlining the CTF's concerns with Bill C-11.

Third, it contains the text from the CTF's report on Bill C-11, which was written with the advice and input of Dr. Michael Geist of the University of Ottawa.

Finally, it contains a transcript of a podcast in which our Federal Director, Franco Terrazzano, interviews Ontario Director Jay Goldberg and Dr. Geist about the C-11 report.

For those who want to get the key points quickly, the newspaper columns and interview transcripts are a great introduction, while the report dives into the deep detail of the issue.

Section I: Newspaper Columns

Summer 2021

Free speech can't be filtered through a bureaucratic superstructure

Free speech ensures that Canadians have the right to tell governments when they're wrong. While this may be unpleasant for governments, it is absolutely vital in a democratic society.

Rather than strengthening Canadians' rights, the Trudeau government wants to filter free speech through the lens of a bureaucratic superstructure.

There can be no doubt that there are bad things on the internet. Child pornography, hate speech, and other such crimes are detestable. But these crimes are already labelled as such through the criminal code with lengthy prison sentences for those who are convicted.

If the federal government wants to review these laws, that's a discussion worth having. However, it is an entirely separate issue.

The government wants you to believe it's targeting hate speech, when in reality it's targeting free speech.

Experts say that the Trudeau government's new proposed law would fundamentally weaken free speech in Canada and would require a costly bureaucratic superstructure to enforce all of the government's new rules.

As University of Ottawa Law Professor Michael Geist put it, the government seems to treat "freedom of speech as a danger to be constrained" rather than a right to be defended.

The planned legislation would create four new government bodies, which would become the foundation of a costly new bureaucratic superstructure.

The new bodies include a Digital Safety Commission, led by a commissioner appointed by the federal cabinet, and an Advisory Board composed of seven members chosen by the Minister of Heritage.

The commissioner and Advisory Board would be tasked with identifying content that should not be kept online and would refer that content to a new tribunal.

Does anyone really believe a commissioner appointed by cabinet and an Advisory Board appointed by the Minister of Heritage would be completely impartial in identifying what should be removed online?

Of course not.

If these new bodies were created today, all eight bureaucrats would be appointed by the Trudeau cabinet. Does that sound fair, balanced, and neutral?

Some of the powers that would be handed to the new tribunal are reminiscent of the *Ministry of Truth in George Orwell's 1984*.

The tribunal, acting on the recommendations of the commissioner, could order online communication services like Facebook and Twitter to take down any content the government deems harmful.

These platforms would have to address any complaints within 24 hours. Failing to remove content could lead to an indictable offense and fines of up to $25 million.

These undemocratic proposals seem eerily similar to those supported by authoritarian regimes.

Canadians shouldn't have to rely on a hope and a prayer that a superstructure of bureaucrats installed by a partisan government will safeguard our right to criticize that very same government.

To put the cherry on top of this disastrous cake, the Trudeau government's new bureaucratic superstructure would cost taxpayers millions of dollars a year.

Online communications services would face regulatory charges to do business in Canada, which no doubt will be passed onto consumers.

The government's new proposals amount to a dangerous shift toward state censorship. Canadians, not a costly bureaucratic superstructure, should be able to determine exactly how and why they want to criticize the government online.

With an election just weeks away, now is the perfect time to have a vigorous national debate about government censorship.

Jay Goldberg is the Interim Ontario Director for the Canadian Taxpayers Federation

Winter 2022

Freeland tweet makes the case against online censorship

Imagine if Chrystia Freeland's tweet about Erin O'Toole's health-care policies had been vetted by a layer of government bureaucracy.

For those who have been enjoying the summer rather than obsessing over political shenanigans, Freeland tweeted a video of O'Toole seemingly embracing the idea of private health care. But the clip cut the part where O'Toole said universal access is paramount. Twitter flagged Freeland's tweet as "manipulated media."

Now imagine if bureaucrats had to make a ruling on Freeland's tweet.

Should they side with the government that appointed them? Or should they side with someone who might be their boss in a month?

While these questions may seem abstract now, the federal government's internet censorship agenda could make these questions much more real in short order.

For months, Prime Minister Justin Trudeau has been trying to convince Canadians that we desperately need government bureaucrats to regulate, filter and block online content that might be seen as harmful.

But Freeland's tweet lays bare the ever-true reality of politics: governments have a poor track record when it comes to telling Canadians the truth. How can we trust bureaucrats appointed by government to become neutral arbiters of truth? The fact is, we can't.

Canadians are smart. We know that politicians don't always tell the truth. We can tell when words are taken out of context. No government adjudication is necessary.

Yet, earlier this year, the Trudeau government introduced Bill C-10. The legislation sought to give massive new powers to government bureaucrats to put Canadians' online content under the microscope.

Under the guise of promoting Canadian content, unelected regulators at the Canadian Radio-Television and Telecommunications Commission would have been given the power to monitor what Canadians watch and share online and ensure it conforms to government approved standards.

This attack on free speech is unprecedented.

"Regulating user generated content in this manner is entirely unworkable, a risk to net neutrality, and a threat to freedom of expression," said University of Ottawa Law Professor Michael Geist.

The government also released a proposal for a so-called online harms bill earlier this summer, which would take government censorship a step further.

The Trudeau government's rationale for introducing this sweeping new legislation was supposedly to guard against online harms like hate speech and child pornography, but these evils have already been illegal under the criminal code for decades.

The government's proposal would create a new Digital Safety Commission, led by a Commissioner chosen by cabinet, and a new tribunal, whose members would be chosen by the minister of heritage.

Collectively, the Commissioner and the tribunal would be empowered to recommend and ultimately block online content that they deem to be harmful.

Given that all of the powerful actors would be appointed by politicians, there is a clear risk that the very partisans that appoint these bureaucrats might be able to influence what should or should not be removed online.

While the targeted content might be online harms today, what's to stop the government from expanding the parameters of those bureaucrats' powers tomorrow?

The combination of Bill C-10 and the online harms legislation sets the stage for significant government influence over what Canadians can watch, see and share. And these powers could easily be expanded in the future.

Freeland's tweet has unintentionally shown Canadians exactly why government bureaucrats should not become Canada's new arbiters of truth.

When it comes to freedom of expression, Canadians, not government bureaucrats, should be put in the driver's seat.

Jay Goldberg is the Interim Ontario Director at the Canadian Taxpayers Federation

Winter 2022

Censorship déjà vu on Parliament Hill

Buried in a news cycle dominated by former Conservative leader Erin O'Toole's sacking and honking truckers, Heritage Minister Pablo Rodriguez unveiled the government's replacement for Bill C-10. That bill died in a storm of controversy when Prime Minister Justin Trudeau called last September's election. At this moment of peak distraction, Rodriguez decided to revive it.

He tried to spin the new bill, known as Bill C-11, as a marked change from the government's attempts to regulate free expression online, including on social media. He claimed that the government "listened to concerns" about Bill C-10 and took them into account in crafting Bill C-11.

But make no mistake: this is the same government censorship is slightly fuzzier sheep's clothing.

Bill C-10 was heavily criticized for allowing government bureaucrats at the Ministry of Heritage to regulate social media content. In response to those concerns, Rodriguez claimed that Bill C-11 would exempt social media content from government regulation.

But it turns out Rodriguez's exemption has an exemption of its own.

Professor Michael Geist of the University of Ottawa notes that Bill C-11 still allows the Canadian Radio-Television and Telecommunications Commission to regulate social media content.

So, while bureaucrats in the Ministry of Heritage will no longer have the power to regulate social media content, as was proposed in Bill C-10, the government now wants to farm out its dirty work to the CRTC.

There are three circumstances in which the CRTC will be allowed to regulate social media content: if it indirectly or directly creates revenue; if the program is broadcast by a broadcast undertaking not regulated by the CRTC; and if the program has been given a unique identifier under an international standards system.

As Geist notes, these three exemptions may sound complicated, but content uploaded to sites like YouTube and apps like TikTok are still vulnerable to government regulation and censorship. Under Bill C-11, the CRTC will have the power to require media platforms to promote the accessibility of certain content over others.

That means the censorship danger is still clear and present. When bureaucrats are given the power to interfere with freedom of speech and freedom of expression, there's always a risk that they'll turn down the volume on critics and promote the messages they want Canadians to see.

Despite what Rodriguez and others in the Trudeau government might try to argue, certain social media content is very much subject to government regulation under Bill C-11.

When the Trudeau government was trying to pass Bill C-10 into law last year, Canadian society was largely unified in opposition to the government's efforts.

Journalists, academics, civil liberties groups, privacy experts, librarians and think tanks, among others, all sounded the alarm on the government's censorship efforts.

The Independent Press Gallery, for example, expressed "serious concern to the harmful effects on freedom of expression and principles of law that will ensue if the government moves forward with the proposal."

OpenMedia called the government's efforts "dangerously misguided."

By keeping a mechanism in place to regulate social media content, which empowers bureaucrats to push some content online over others, the Trudeau government is going right back down the rabbit hole that generated such grave concern just last year.

Rodriguez's claim that the government listened to Canadians is ridiculous. Rather than taking the time to consult with Canadians from coast to coast about such an important issue, the Liberals are trying to ram through a replacement for Bill C-10 just weeks after Parliament came back into session.

The bottom line is that the Trudeau government didn't listen to Canadians. It didn't listen to experts, who called for a full social media content exemption from regulation, and it didn't even bother to spend the time to engage with concerned citizens.

Jay Goldberg is the Ontario Director at the Canadian Taxpayers Federation

Spring 2022

The Trudeau government is on a quest for censorship

Sign first, then we'll discuss the details.

Nobody would trust a real estate agent or used car dealership with that approach, but that's how the Trudeau government is trying to sell its plan to regulate the internet.

The government is currently trying to rush new censorship legislation through Parliament at lightning speed. Through Bill C-11, the Trudeau government plans to hand the CRTC the power to control what content Canadians are exposed to online. This includes filtering feeds on popular apps like Netflix, YouTube and TikTok.

As if that wasn't bad enough, the government is deliberately choosing not to disclose the scope of these new regulatory powers until after the bill becomes law.

Such an approach runs roughshod over the democratic process.

If the government wants to ram through new censorship powers, at a bare minimum we deserve to know just how aggressively the CRTC will be instructed to regulate what we see and share online.

The government can't even get bureaucrats singing from its own hymnbook.

Heritage Minister Pablo Rodriguez has promised up and down that user-generated content, meaning content a typical Canadian might upload to YouTube or share on Twitter, will not be regulated through Bill C-11.

But Ian Scott, the chair of the CRTC, the entity that will be responsible for doing the regulation on the government's behalf, says user generated content will be fair game.

Who should Canadians believe?

If the CRTC says it will have the power to regulate user-generated content through Bill C-11, and they're the ones tasked with implementing it, Canadians should listen to the CRTC.

As the government attempts to give itself sweeping new powers, it is worthwhile to ask why the government wants bureaucrats to have these new powers in the first place.

The government claims it wants to do so to ensure that Canadians are exposed to enough Canadian content online.

But this raises serious questions.

First, is the government competent to decide what should count as Canadian content?

As of right now, the CRTC's process in making that determination is flawed. A biopic of the Trump presidency, entitled Gotta Love Trump, is considered by the CRTC as Canadian content, while the Handmaid's Tale, based on legendary Canadian writer Margaret Atwood's famous novel, is not.

On the competence question, the answer clearly is no.

Second, what happens if the government decides it wants to use the CRTC's new powers to influence what we see and share online based on standards other than Canadian content?

It's easy to foresee mission creep. Today, the government wants to promote Canadian content. But tomorrow, with the CRTC's powerful new tools to regulate the internet, Bill C-11 could easily be repurposed to quiet dissent or promote favourable narratives. Public Safety Minister Marco Mendicino, for example, has mused about the government pursuing new regulatory measures for the sake of "social cohesion."

With these clear risks, it is worth asking whether this legislation is even needed, as the government claims, to ensure Canadian content gains adequate exposure.

The truth is that Canadian content is thriving like never before. In 2020 alone, Canada's film and television industry enjoyed $6 billion in foreign investment, up five per cent from the year prior. And Canadian films and shows are easy to find on streaming services like Netflix.

If the sole rationale of Bill C-11 is to have Canadian content thrive and succeed online, then present data demonstrates that the legislation simply isn't needed. The government could just scrap Bill C-11 and call it a day.

The fact that Rodriguez and the Trudeau government are still aggressively pushing Bill C-11 in light of these facts demonstrates that the government's motive is not, as it claims, to promote Canadian content. Rather, it is all about control.

Jay Goldberg is the Ontario Director at the Canadian Taxpayers Federation

Jay's Testimony, June 2, Standing Committee on Canadian Heritage

Mr. Jay Goldberg (Director, Ontario, Canadian Taxpayers Federation):

Thank you very much.

I'm very grateful to be here today to speak on behalf of tens of thousands of supporters, including tens of thousands of Canadians who have signed our petition calling on the government not to move forward with Bill C-11.

The Canadian Taxpayers Federation is concerned by this bill for three key reasons.

First, the government's "empower the CRTC now, give guidance later" approach raises major concerns about accountability. There are many Canadians who are asking why the government is trying to give such unprecedented power to an entity like the CRTC without first sharing with Canadians exactly how much power and on exactly what basis it plans to do so. The government has said that instructions and guidance will come later, but that's a backward approach when it comes to accountability.

Second, contrary to the government assertions, the CRTC has determined that user-generated content will be regulated by the CRTC under Bill C-11 through broadcast regulation. As Professor Michael Geist has said, "no other country in the world regulates content in this way," and to do so is a major threat to individual freedom. Again, many are asking why the government wants to give the CRTC the power to regulate user-generated content while at the same time saying that it's not.

Before I move to my third point, let me note that although the government has insisted that user-generated content won't be regulated, CRTC chair Ian Scott told this committee that "section 4.2 allows the CRTC to prescribe by regulation user-uploaded content subject to very explicit criteria." In addition, the very fact that user-generated content would be regulated demonstrates that this bill is not, as the minister and others have suggested, solely about Canadian culture.

Third, this could set a very dangerous precedent for the future. Today, this new government regulatory machine that is being built plans to filter content based on what it considers to be Canadian, but this could be repurposed in the future for other means. Not being able to hold the CRTC accountable in determining what is or is not Canadian content may concern some, but not being able to hold it accountable on future issues such as social cohesion, as Minister Mendicino has alluded to in the online harms conversation, is even more concerning.

There are also deep concerns about the process of this legislation, the lack of debate and the government failing to genuinely listen to Canadians. Our right to free speech and free expression must be sacred, and we should not be in a situation in which a bill like this is being pushed through Parliament in this way, with such limited debate and opportunity.

Thank you for having me here. I look forward to your questions.

Mrs. Rachael Thomas (Lethbridge, CPC):

Thank you very much, Chair.

My first question is for Mr. Goldberg.

Mr. Goldberg, I'm wondering if you can just talk to me a little bit about the work you

do on behalf of Canadian consumers and how Bill C-11 might impact them and what your concerns are around that.

Mr. Jay Goldberg:

Yes, thank you for the question.

Essentially, we're deeply concerned about this legislation because it could impede the ability of Canadians to hold the government accountable, and as an organization we focus on less waste, lower taxes and more affordable government. Unfortunately, this legislation sets a very dangerous precedent. It allows for this brand-new regulatory machine that can filter content based on what it considers to be Canadian, but what we're all concerned about is the potential for that to expand into other areas in the future. It may not be phrased that way now, but we have to worry about what governments might do in the future and what ground this lays for potential stretching as we go forward.

Mrs. Rachael Thomas:

Sorry, let's be really clear here then. When you say "potential stretching" could take place in how this bill is used to require these different platforms to curate content in a specific way according to whatever the government mandates through the CRTC, what are you potentially concerned about?

Today it looks innocent. It looks like it's just propping up Canadian content, even though it's an antiquated definition, and that certainly is harmful in and of itself. Nevertheless, beyond that do you have any other concerns?

Mr. Jay Goldberg:

Absolutely. This legislation sets the stage for the government, through the CRTC, to be able to decide what ought to be promoted and what ought not to be promoted as we view products online. So, yes, today the criteria might be Canadian, that is, whether or not something is considered to be Canadian content. However, I would note here that some of the programming decisions are very outdated. A film called *Gotta Love Trump* is actually considered Canadian content while *The Handmaid's Tale* is not.

There are lots of problems there. But what I would also say is, yes, there could be expansion. Today the government's talking about whether or not something is considered to be Canadian. We've heard Minister Mendicino talk about things like social cohesion. We know that the topic of online harms is coming down the pipeline, and so we're very concerned that this could create a mechanism through which the government could promote and demote certain Canadian content—what people are saying based on standards that are not just Canadian and that could go all the way to social cohesion, which is very vague and allows a lot of room for the government to make decisions like that.

Mrs. Rachael Thomas:

Thank you.

With regard to the bill, presently there is no policy directive that has been given to the CRTC. In other words, Bill C-11 is vague in some areas, and it will be left up to the CRTC to determine how they are going to apply the bill at large.

Without a policy directive, it is impossible for the CRTC to understand what the minister's intent is. Now, the minister is saying that will come later, and he's asking Parliament to trust him as he requests that this legislation be moved forward. However, that seems out of step. Do you have any thoughts on that?

Mr. Jay Goldberg:

Absolutely.

If the government is trying to say that they're going to create this legislation and pass this, and then they're going to figure out exactly what the orders are down the line, Canadians shouldn't have to trust that. We need proof of exactly what the government intends to do with this legislation. The regulations, the rules and the instructions should all be coming first. This is a very backward way of doing things in government, to pass a bill, to give all kinds of power to an organization that is rather unaccountable, and then just to presume that the minister, based on what the minister decides at a later date, will simply make a determination, which, because the power has already been given, Parliament has little way to stop.

Mrs. Rachael Thomas:

The minister has said that user-generated content, in other words the content put up by individuals, is exempt from the bill. However, the chair of the CRTC, Mr. Scott, has said nope, that in fact it is captured by the bill. Obviously, there's a discrepancy there that I would say is all the more reason for clear guidelines to be established at the beginning.

Do you have thoughts with regard to the capturing of user-generated content?

Mr. Jay Goldberg:

Absolutely. I've had conversations with Professor Michael Geist, one of the foremost experts in this area. What he says is that there's an exception for user-generated content, but then there's immediately an exception to the exception, which he says throws the door wide open. As I quoted Mr. Scott earlier, he said, "section 4.2 allows the CRTC to prescribe, by regulation, user-uploaded content subject to very explicit criteria." That's pretty open and shut. There is room for the regulation of user-generated content. If the CRTC is the organization that's going to be getting that power—and indeed they themselves are saying they're getting that power—then I think they're the ones we have to listen to.

Mrs. Rachael Thomas:

Some content will be bumped up in the queue and some will be bumped down when people are using their search bars to look for information. Of course, we know the content that will be bumped up is that which fits the definition of CanCon, which is very antiquated. Then anything that doesn't fit that definition will be bumped down.

It could even be produced by a Canadian on Canadian soil and be full of Canadian songs, etc., but it will not capture the attention of an audience because it will be bumped back to page 500 of the Internet, where it's undiscoverable.

The Chair:

You have 30 seconds left.

Mrs. Rachael Thomas:

Do you have thoughts on that?

Mr. Jay Goldberg:

Absolutely. There is a great documentary on the Maple Leafs' playoff run in 2021. Lots of us love the Maple Leafs. It's not considered Canadian content and it will go down to the bottom of your streaming service, while *Gotta Love Trump* will be right at the top because it's considered Canadian.

Mrs. Rachael Thomas:

Thank you.

Section III: Online Government Censorship Report

A Fatally Flawed Gateway to Government Censorship

Foreword

The government wants the power to regulate the internet. Then it wants to decide what content qualifies as Canadian. And, based on that determination, it wants to make it easier for you to find that content.

All of that raises questions about Bill C-11 and Ottawa's push to give the Canadian Canadian Radio-television and Telecommunications Commission (CRTC) the power to regulate the internet.

Do Canadians want the government to regulate the internet? Until now, the answer has always been no. This isn't about terrorism or child pornography – criminal law already applies to those evils and the people involved are prosecuted. This is about whether the government should decide what shows up and what gets buried on Canadians' online platforms.

The government says it will use the power to make sure Canadian content shows up more prominently, but that raises so many more questions.

Is the government competent to decide what Canadians consider Canadian? What if a Canadian producer makes a documentary about an American president? What about a Canadian with a podcast about cricket matches in Pakistan? What about a YouTube channel operated by Quebec or Western separatists? What happens if the government's starts to view content that's inconvenient for the government as unCanadian?

The government says none of this will be a problem. The legislation will give the CRTC the power to regulate the internet and the agency will figure out how to do it. That's asking for a lot of trust from Canadians.

There's a true oddity at the heart of this issue: money. The government says it's doing this to make internet giants pay for Canadian content. But money is already pouring in for Canadian content makers. And if this is about the money, why is the government entangling it with fundamental freedoms that give Canadians the right to consume and communicate whatever they want online?

There's another oddity: the rush. The government tried to rush Bill C-10 (Bill C-11's predecessor) because it clearly knew a snap election was coming, but the initiative for that initial bill was ultimately ground to a halt with controversy. Now, with no hint of an election looming, the government is again limiting debate and using every procedural tactic to push through Bill C-11. Why the rush? Why not take the time to hear from both advocates and critics? The government's process with this bill is almost as concerning as its content.

Lastly, whenever the government does anything there needs to be a discussion about making sure it doesn't go too far. The government says it wants to regulate the internet to make sure Canadian content gets viewership and revenues, but a regulatory machine built to promote Canadian content, and thereby demote other content, can be repurposed. It opens the temptation for the government to quiet critics. Perhaps the current government could resist that temptation, but will all future government be that virtuous? The government dismisses any concern about government overreach, but it isn't implementing any protections to prevent erosions of fundamental rights of expression.

Ultimately, C-11 will have an impact on the way all Canadians express themselves and consume content online. They deserve the fullest possible explanation about those impacts and the associated risks. This report provides that explanation.

Introduction

Bill C-11 would hand the Canadian Radio-television and Telecommunications Commission (CRTC) the power to regulate all audio-visual content online to determine whether the content is Canadian and how easily consumers should be able to access that content based on that standard.

Ultimately, Bill C-11 is about government power: through this legislation, the government wants bureaucrats to have the power to decide what is Canadian content online and what is not, even though the government has not presented a roadmap of exactly how the CRTC would make such a determination. The government wants Parliament to hand the CRTC new powers and is hiding the scope and guidelines it will give the CRTC until after the legislation is passed into law.

Audio-visual content generally falls into two categories: commercial and non-commercial. Bill C-11 would empower the CRTC to regulate commercial content, but there is serious concern that the legislation's definition of commercial content is overly broad and could capture some user generated content, which is traditionally seen as non-commercial. Regulation in this case would mean allowing the CRTC to decide whether the online content in question should be considered Canadian content or not, which would then lead to the promotion of certain online content (and, inherently, the demotion of other content) that consumers see based on that standard.

While the government says it will regulate commercial content, but allow some user-generated content to be made exempt, its guidelines for the CRTC are

incredibly vague, potentially allowing bureaucrats to shift standards in deciding exactly which pieces of user-generated content should be regulated. This means that online posts made by average everyday users on platforms like TikTok or YouTube could easily become regulated and fall within the CRTC's purview. The CRTC would then determine, based on its own standards, whether that content should be pushed on Canadian consumers. Inherently, this means other content will become less discoverable, even on social media platforms.

While Bill C-11 may be handing the CRTC the power to promote certain content on the basis of whether it is Canadian in character, the toolset given to the CRTC to do so could set a dangerous precedent in the future. If government bureaucrats have the power to reorder what we see online on the basis of one set of criteria, a future government could easily expand the categories of content it wants the CRTC to reorder. Other bills, such as the government's online harms bill, could serve as the basis for that expansion in the future. Thus, Bill C-11 is just the starting point for online content regulation and must be viewed in concert with other government initiatives to limit free speech.

Finally, after examining the rationale given by the government for the creation of Bill C-11, it is clear that the legislation is not only dangerous, but also unnecessary. The government's stated goal is to promote the creation of Canadian content in the online streaming world. However, Canadian content is thriving more than ever before, with record foreign and domestic investment in recent years. If the sole objective of Bill C-11 is for Canadian content to survive and succeed, the legislation is simply not needed.

The remainder of the report will proceed as follows. First, the report will examine exactly what Bill C-11 is, including its content, context and what the government says it wants to achieve through the legislation. Second, the report will outline why the government's rationale for the legislation, supporting domestic Canadian

content, doesn't hold water and it will show that Canadian content has been thriving in recent years. Third, the report will outline the core concerning provisions of Bill C-11, most notably the regulation of user generated content and the burgeoning new powers to be given to the CRTC.

What is Bill C-11?

Overview

Bill C-11, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*,[1] was tabled by Canadian Heritage Minister Pablo Rodriguez on Feb. 3, 2022. The bill, known as the *Online Streaming Act*, is the government's follow-up to Bill C-10, which was introduced in the previous Parliament.

The original Bill C-10 made it through three readings in the House of Commons and two readings in the Senate. Despite desperate attempts to pass the bill, Bill C-10 finally stalled at committee consideration shortly before the Senate's summer break, followed by the federal election in fall 2021. From the start, Bill C-10 was controversial, and its failure was a relief to many.

During the election campaign, the government committed to re-introducing the legislation within the first 100 days of a new Parliament. The new bill contains some modest changes to the prior bill, but many of the sources of concern that sparked widespread discussion regarding government or CRTC regulation of user generated content on the internet remain.

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1. Bill C-11, *An Act to amend the Broadcasting Act and to make consequential amendments to other Acts*, 1st sess, 44th Parliament, 2021, online: *Parliament of Canada* https://www.parl.ca/legisinfo/en/bill/44-1/c-11 [Bill C-11].

What does Bill C-11 do?

Bill C-11 would establish a new class of regulated broadcaster called the "online undertaking." Online undertakings would include any services that transmit programs over the internet in Canada. These new online undertakings would not be licensed per se, but they would face regulation from the CRTC including:

- mandated registration,
- the possibility of mandated payments to support Canadian content production,
- discoverability requirements that would require online services promote Canadian content,
- mandatory disclosure of detailed confidential information, including algorithmic data, and
- the prospect of multi-million-dollar penalties for failure to comply that could be applied to any online undertaking, whether an internet giant or a smaller, niche podcasting or gaming service

Much like Bill C-10, the bill leaves many of the specifics to the regulator, subject to a prospective policy direction in which the government would direct the commission to prioritize issues such as support for diversity and inclusion as well as revisiting what is considered Canadian content. The government admits that the definition of Canadian content is outdated and requires updating, but has provided little guidance on what it has in mind.

In fact, the government has indicated that it will only publicly release the policy direction after Bill C-11 receives royal assent, meaning that these specifics will remain hidden for the foreseeable future. The government wants Parliament to empower the CRTC now and figure out guidelines later. This approach is both backwards and lacks transparency.

Why Bill C-11 Isn't Needed

What is the political context for this legislation?

Bill C-11 and its predecessor Bill C-10 did not come about by accident. Rather, the bills are better understood as part of a broader effort to regulate the online environment.

In recent years, the government has emphasized internet regulation with obvious implications for freedom of expression. Laws, including hate speech, defamation, and child pornography, have always applied to online content and efforts to ensure their effectiveness in the online environment may be needed. However, the government's regulatory shift envisions applying additional laws that invoke broadcasting-style rules or envision the establishment of new regulators with mandates that could include takedown requirements or website blocking.

What are the government's stated goals?

Former Heritage Minister Steven Guilbeault made it clear from early on that his top legislative priority was to get money from web giants[2] and his first legislative step would be to use Bill C-10 to target internet streaming services such as Netflix, Amazon, and Disney, with new requirements to fund Canadian content and to increase its discoverability by making it more prominent for subscribers.

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2. "Town hall with / Assemblee virtuelle avec Steven Guilbeault" (16 September 2020) at 00h:47m:58s, online (video): *Vimeo* <player.vimeo.com/video/458756268>.

While the government's desire to regulate the internet was clear well before Bill C-10 was tabled and under multiple ministers, it was under Guilbeault that the efforts accelerated. By 2020, Guilbeault actively began to seek new discoverability requirements, mandated payments, and myriad other conditions for streaming services. He argued that support for the film and television sector was declining due to the emergence of internet streaming services, which had resulted in decreased revenues for the conventional broadcast sector and therefore lower contributions to Canadian content creation. In fact, Guilbeault told *Le Devoir*, without acting there would be a billion-dollar deficit in support in the next three years[3] — a claim that was dubious at best.[4]

Guilbeault's objective was to generate a few hundred million dollars more per year in local production by the internet streamers. In other words, he was expecting roughly $2 billion in new investment over three years in Canadian content from U.S. entities due to his planned regulations (moving from a billion-dollar deficit to a billion dollars in extra spending). In addition, the government stated that a key objective was "fair and equitable treatment as between online and traditional broadcasters" and that the current system "perpetuates a regulatory imbalance which puts Canadian broadcasters at a competitive disadvantage."[5] Bill C-10, the

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3. Guillaume Bourgault-Côté, "Les géants du Web coûtent cher au milieu culturel canadien" (18 September 2020), online: *Le Devoir* <www.ledevoir.com/culture/586138/culture-un-milliard-en-moins-a-cause-des-geants-du-web>.
4. See e.g. "The Broadcasting Act Blunder, Day 16: Mandated Payments and a Reality Check on Guilbeault's Billion Dollar Claim" (11 December 2020), online (blog): *Michael Geist* <www.michaelgeist.ca/2020/12/broadcastingactblunderbillion/>.
5. Canadian Heritage, "Summary: Amendments to the Broadcasting Act," PowerPoint, at 12, 9, online: *Broadcasting Accessibility Fund* <www.baf-far.ca/sites/default/files/BOD/Summary%20-%20Canadian%20Heritage%20-%20Bill%20C-10%20-%20Amendments%20to%20the%20Broadcasting%20Act.pdf>.

government claimed, would level the playing field.[6] Much the same arguments animate Bill C-11.

What does the data about film and television production actually tell us?

The data simply does not support the government's claims regarding the state of the industry. The regulated sector enjoys many benefits not available to internet streaming services, and pre-COVID, the industry had enjoyed record production numbers with foreign streaming services being major contributors.

The years leading up to the introduction of Bill C-10 and C-11 were indicative of a booming film and television production industry in Canada. The total value of the Canadian film and television sector exceeded $8.3 billion in 2017 (more than a billion more than had been recorded over the previous decade), increased to over $8.8 billion in 2018, and $9.4 billion in 2019, before falling slightly to $9.3 billion in 2020.[7]

Similarly, Canadian content production hit an all-time high in 2018-19 at $3.3 billion.[8] Money was pouring into the sector, with distributors and foreign financing leading the way. Foreign investment in Canadian content production doubled from

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6. "Bill C-10, an Act to modernize the Broadcasting Act" (last modified 31 August 2021), online: *Government of Canada* <www.canada.ca/en/canadian-heritage/corporate/transparency/open-government/standing-committee/dm-transition-material-2021/bill-c10-modernize-broadcasting-act.html>.
7. Canadian Media Producers Association, *Profile 2020: Economic Report on the Screen-based Media Production Industry in Canada* (Ottawa: Canadian Media Producers Association, 2021) at 9, online (pdf): CMPA <cmpa.ca/wp-content/uploads/2021/05/PROFILE-2020_EN.pdf> [Profile 2020].
8. Profile 2020 at 21.

$421 million in 2010-11 to $864 million in 2018-19.[9] While that number dropped by $104 million in 2019-20, "foreign investment still accounted for 26 per cent of the total financing for Canadian content production."[10] By 2020, foreign financing was still the largest source of financing for English-language television production.[11]

Despite the absence of regulatory requirements, Netflix had emerged as one of the leading backers of Canadian content, reporting that it commissioned hundreds of millions of dollars in original programming in Canada in 2016, a number which has continued to grow.

Furthermore, research has shown that Canada ranked first among peer countries with respect to expenditures on television production per capita, expenditures on domestic television production (i.e. Canadian content or equivalent domestic production) per capita, hours of television production per capita, and employment in film and television production per capita.[12] Comparison data on expenditures on television production per capita is particularly striking since it shows Canada far ahead of peer countries such as the U.K., France, and Australia. Further, the data shows that Canadian content fared very well, with more money spent per capita on Canadian content than the equivalent per capita spending on domestic content in other peer countries. The government's claim that new regulatory powers are needed to preserve Canadian content runs counter to the facts.

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9. Profile 2020 at 21.
10. Profile 2020 at 21.
11. Profile 2020 at 43.
12. Nordicity, *International Benchmarking Study of The Canadian Television Production Sector* (Ottawa: Nordicity, 2019), online: Scribd <www.scribd.com/document/446985914/Nordicity-International-Benchmarking-Study-of-the-Canadian-Television-Production-Sector>.

What does the data about "discoverability" actually tell us?

The government has also cited the need to improve the "discoverability" of Canadian content as a critical reason to support Bill C-10 and now Bill C-11. While few would oppose ensuring that Canadian content is easy to find and well marketed, there seemed to be little to support claims that regulatory intervention for streaming services is needed.

In concluding that the CRTC must be able to impose discoverability measures because Canadians have difficulty finding Canadian content, a government panel that issued a discoverability policy recommendation cited two reports.[13] Yet neither make the case for the need for new regulations. One of the reports had nothing to do with Canada and said absolutely nothing about the ability to find or recognize Canadian content. The other was focused on Canada but did not find that Canadians have trouble finding Canadian content – rather, it found a range of experiences and emphasized that "word-of-mouth is Canadians' main discoverability method."[14]

In reality, it is (and was then) not hard to discover Canadian content on Netflix and other streaming platforms, with a simple search for "Canada" and streaming hours of Canadian shows prompting algorithms to promote Canadian content. This, coupled with the recent success of Canadian-based content, should, based on the government's own stated objectives, render Bill C-11 unnecessary.

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13. Mark McCaffrey, Paige Hayes & Jason Wagner, *Can you find that show I didn't know I wanted to watch?: How tech will transform content discovery* (London: Price Waterhouse Coopers, 2017), online: <gsma.force.com/mwcoem/servlet/servlet.FileDownload?file=00P1r00001kQ5Theas>; Telefilm Canada, Discoverability: Toward a Common Frame of Reference: Part 2: The Audience Journey (Montreal: Telefilm Canada, 2016), online: <telefilm.ca/en/studies/discoverability-toward-common-frame-reference-part-2-audience-journey> [Telefilm] (incorrectly cited as a 2018 report but actually dates to 2016).

14. Telefilm at 14.

Core Provisions and Key Concerns

Overview: what is the government's new regulatory approach?

While there are many elements in Bill C-11, this review focuses on the internet regulation issues, with particular focus on the implications for user generated content and internet streaming services. Section 1(1) of Bill C-11 seeks to bring internet services into the scope of the *Broadcasting Act* by incorporating "online undertaking" into the definition of broadcasting undertaking, which is currently focused on conventional broadcasters such as CTV as well as broadcast distributors, such as cable and satellite companies. Online undertaking, in turn, is defined as "an undertaking for the transmission or retransmission of programs over the internet for reception by the public by means of broadcasting receiving apparatus."[15]

The extensive regulation envisioned by Bill C-11 is established through amendments to sections 9, 10, and 11 of the *Broadcasting Act*. These new powers would allow the CRTC to:

- require registration of any broadcasting undertaking (s. 10(1)(i)),
- impose, by order, conditions virtually indistinguishable from licensing requirements (s. 9.1(1)),
- implement a wide range of additional regulations (s. 10 and 11).

15. Bill C-11, s 1(2).

Among the potential regulations under Section 10 are mandated payments for the purposes of: funding Canadian content, supporting Canadian creators, and supporting individuals or groups "representing the public interest in proceedings before the Commission under [the] Act."[16]

The list of conditions under Section 9.1(1) include the mandated disclosure of financial and audience information, a requirement to carry emergency broadcasts, and discoverability requirements that would allow the CRTC to mandate that platforms prioritize some users' content over others.

However, the term "discoverability" is not defined. It therefore falls to the CRTC to decide what it meant and what conditions would be imposed on internet services as a result. This means the CRTC will have the power to make some content more "discoverable" over other content but without any guidance thus far established. Guidance is very much needed, as present rules governing discoverability are extraordinarily outdated and ineffective.

Case Study One

Robin and John Jones are sitting down for a relaxing Sunday evening. They get to the couch and start haggling over what to watch. Robin is a huge fan of renowned Canadian author Margaret Atwood. She's read all of Atwood's books and has heard great reviews of the Handmaid's Tale TV series. While John isn't a huge Margaret Atwood fan, he agrees to watch the show with his wife.

16. Bill C-11, s 10.

Case Study One continued

The Jones's have all of the major streaming services, but as they scroll through the recommendations, the Handmaid's Tale doesn't show up.

Because of the CRTC's outdated Canadian content rules, the Handmaid's Tale isn't actually considered to be Canadian by government bureaucrats. With the hypothetical passage of Bill C-11, the CRTC can use "discoverability regulations" to mandate prioritizing what it views as Canadian content, leaving what the CRTC considers to be non-Canadian content buried in streaming feeds.

Unable to find the Handmaid's Tale, Robin agrees to watch a Toronto Maples Leafs documentary with John. Again, the Jones's start looking for the show, but it doesn't show up in their streaming feeds. Like the Handmaid's Tale, the CRTC does not considered this Maple Leafs documentary to be Canadian content due to outdated methods of determining Canadian content.

While the Jones's feeds don't show content about Canadian icons such as Atwood and the Leafs, the Jones's keep seeing a recommendation entitled Gotta Love Trump. Thanks to the same outdated rules, a show about a controversial American president is actually considered Canadian content because it ticked the right Canadian content certification boxes.

While the CRTC would be tasked with establishing the specifics, the Bill C-11 is also notable in that it grants the commission the power to target individual services or companies with unique or individualized requirements. The source of this targeted approach is Section 9.1(2), which provides:

> *(2) An order made under this section may be made applicable to all persons carrying on broadcasting undertakings, to all persons carrying on broadcasting*

undertakings of any class established by the Commission in the order or to a particular person carrying on a broadcasting undertaking.

Rather than establishing a level playing field, this opens the door to multiple fields with individual companies potentially each facing their own specific requirements and conditions to operate in Canada. These could include individualized data requests or other compliance measures. Such powers are both sweeping and undemocratic, particularly given that the CRTC will have the power to treat some companies differently than others.

While there are scores of issues related to the government's regulatory efforts, there are two overarching concerns with Bill C-11 that will be addressed below. The first involves the regulation of user generated content, while the second involves massive new powers that would be handed over to the CRTC.

Key Concern #1: User Generated Content

How is the government trying to regulate user generated content?

One type of service that was initially exempted from the new regulation under Bill C-10 was user-generated content services. User generated content refers to the wide range of original content created by millions of Canadians. These may be videos featuring their thoughts on political developments on Instagram, short videos of their children accompanied by a favourite song on TikTok, instructional videos on YouTube, or podcasts on Apple Podcasts.

Originally, the bill proposed to add the following after Section 4 of the *Broadcasting Act*:

> 4.1 (1) This Act does not apply in respect of
>
> (a) programs that are uploaded to an online undertaking that provides a social media service by a user of the service – who is not the provider of the service or the provider's affiliate, or the agent or mandatary of either of them – for transmission over the internet and reception by other users of the service; and
>
> (b) online undertakings whose broadcasting consists only of such programs.
>
> (2) For greater certainty, subsection (1) does not exclude the application of this Act in respect of a program that is the same as one referred to in paragraph (1)(a) but that is not uploaded as described in that paragraph.

The Act would also state, at Section 1(2.1):

> A person who uses a social media service to upload programs for transmission over the internet and reception by other users of the service – and who is not the provider of the service or the provider's affiliate, or the agent or mandatary of either of them – does not, by the fact of that use, carry on a broadcasting undertaking for the purposes of this Act.

The two provisions worked together to exclude both users as akin to broadcasters (Section 2.1 exception) and their content (Section 4.1). Without these provisions – and Section 4.1 in particular – anything uploaded by users would be treated by Canadian law as a "program" and subjected to CRTC regulation. Since the bill covers all audio-visual content, this meant that videos posted to TikTok, or YouTube would be treated as a program subject to potential regulation much like a program airing on a conventional broadcaster. Government officials confirmed this at a hearing on April 23, 2021, with Owen Ripley, Canadian Heritage's Director

General of Broadcasting, Copyright and Creative Marketplace, stating:

> But if the exclusion is removed – if 4.1 is struck down – the programming we upload to YouTube, that programming that we place on that service would be subject to regulation moving forward but would be the responsibility of YouTube or whatever the sharing service is. The programming that is uploaded could be subject to discoverability requirements or certain obligations like that.
>
> If the way forward is to maintain the exclusion for individual users but to strike down the exclusion for social media companies, that means that all the programming that is on those services would be subject to the Act regardless of whether it was put there by an affiliate or a mandatary of the company.[17]

Despite the warning, in late April 2021, the Parliamentary Secretary to the Minister of Canadian Heritage, Julie Dabrusin, put forward a motion to remove the exclusion, which gained the support of the committee. The removal sparked widespread concern about the implications of regulating user generated content. While the individuals would not be treated as broadcasters subject to regulation, their content could face CRTC rules such as discoverability requirements as a "program" subject to regulation.

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17. "Meeting No 26 CHPC – Standing Committee on Canadian Heritage (23 April 2021), online (video): *ParlVU* <parlvu.parl.gc.ca/Harmony/en/PowerBrowser/PowerBrowserV2/20210423/-1/35243>.

How has user generated content regulation evolved from Bill C-10 to Bill C-11?

Canadian Heritage Minister Pablo Rodriguez has insisted that the government has addressed concerns regarding the regulation of user generated content by restoring the section 4.1 exception for treating user content as programs subject to potential regulation. When combined with the return of section 2.1 exempting users from being treated as broadcasters, the government claimed that it "listened, especially to the concerns around social media, and we've fixed it." However, it turns out that the bill is not quite as advertised. While Section 4.1 was restored, the government has added 4.1(2), which creates an exception to the exception. That exception to the exception – in effect a rule that does allow for regulation of content uploaded to a social media service – says that the Act applies to programs as prescribed by regulations that may be created by the CRTC.

The bill continues with a new Section 4.2, which gives the CRTC the instructions for creating those regulations. It says the CRTC can create regulations that treat content uploaded to social media services as programs by considering three factors:

- whether the program that is uploaded to a social media service directly or indirectly generate revenue
- if the program has been broadcast by a broadcast undertaking that is either licensed or registered with the CRTC
- if the program has been assigned a unique identifier under an international standards system[18]

18. Bill C-11, s 4.2(2).

The implications of this provision were recently confirmed by CRTC Chair Ian Scott, who told the Standing Committee on Canadian Heritage that *"Section 4.2 allows the CRTC to prescribe by regulation user uploaded content subject to very explicit criteria. That is also in the Act."*

While the government may have intended to limit the scope of potential regulation, these factors are all open to broad interpretation. For example, direct or indirect revenue generation can include sponsorships, ad revenues, or even commercial opportunities that arise because of their program.

Many of those programs will be posted to services such as YouTube that are captured by the second factor and involve some form of unique identifier to satisfy the third condition. In other words, far from limiting the scope of regulation, the new section swings the door wide open.

Case Study Two

Bob Smith is a lover of all things canoe. Bob's father took him canoeing for weeks every summer as a young kid and he's loved it ever since. Because of his love of canoeing, Smith started his own podcast and YouTube channel. Smith talks about all of the latest canoeing equipment and chronicles each canoe trip that he takes. While Bob didn't think he would be an overnight sensation, his subscriber numbers increase tenfold over the span of just two months. After starting with just a handful of followers, Bob is now drawing in crowds of hundreds from across Canada and around the world.

Johnson's Canoeing Company decided to give Bob a ring to talk about sponsoring Bob's canoeing podcast. While Johnson's is based in Louisiana and Bob is making podcasts from Thunder Bay, enough Americans are listening to

Case Study Two continued

Bob's show that Johnson's feels a small-time endorsement deal might help both sides. Johnson's could promote their products while Bob could use the extra money to upgrade his equipment and think about making even more frequent podcast episodes.

Under Bill C-11, if Bob accepts the sponsorship, his show, which is available on multiple platforms including YouTube, becomes subject to the CRTC's discoverability regulations. Because Bob is from Canada, the CRTC might determine that Bob's podcast does in fact qualify as Canadian content. However, the CRTC would ensure that Bob's podcast is included in feeds of Canadians who aren't really interested in canoeing, because the CRTC is focused on pushing Canadian content over all else. This could lead to declining click rates. YouTube could then interpret the lower click rates as a sign that the content is no longer popular or desirable, leading to less media feed promotion for viewers outside of Canada. In short, if Bob accepts the sponsorship, viewership outside of Canada might decline substantially.

Bob ultimately decides to turn down Johnson's sponsorship offer. Because Bill C-11 and its discoverability rules could push his content on Canadians who really aren't interested in canoeing, lowering his discoverability outside of Canada, the endorsement would ultimately lead to lower non-Canadian viewership. An opportunity to promote Canadian content abroad becomes lost as, ironically, an American sponsorship would lead to fewer views outside of Canada.

The law does not tell the CRTC how to weigh these factors. Moreover, there is a further exclusion for content in which neither the user nor the copyright owner receives revenue as well as for visual images only. The result are regulations that leave considerable room for CRTC interpretation at a time when confidence in the Commission is low given recent allegations of bias and questions about who might be appointed to lead it in the future. This empower now, regulate later approach is deeply concerning.

Key Concern #2: Dangerous New Powers Handed to the CRTC

What are the expansive powers delegated to the CRTC?

One of the most troubling aspects of Bill C-11 is the virtually limitless reach of the CRTC's jurisdictional power of audio-visual services. During the Bill C-10 debate, an internal government memo identified a wide range of sites and services potentially covered by the legislation. Given that the approach remains unchanged in Bill C-11, the scope remains the same. The memo noted that bill could cover podcast apps such as Stitcher and Pocket Casts, audiobook services such as Audible, home workout apps, adult websites, sports streaming services such as MLB.TV and DAZN, niche video services such as Britbox, and even news sites such as the BBC and C-SPAN. While it is uncertain whether the CRTC would exempt some of these services, the broad scope of the language in the bill raises the possibility of extensive regulatory reach.

The government paints Bill C-11 as about making the web giants pay their fair share, yet documents later revealed that the department recognizes a far broader regulatory reach. The bottom line is that the potential scope for regulation is virtually limitless since any audio-visual service anywhere with Canadian subscribers or users is caught by the rules. Bill C-11 does not contain specific thresholds or guidance. In other words, the entire audio-visual world is fair game, and it will be up to the CRTC to decide whether to exempt some services from regulation.

Supporters of the bill will likely argue that the CRTC will establish some thresholds where regulation would not advance policies under the Broadcasting Act. Yet even that approach assumes that the CRTC has jurisdiction over all services and that it has also the power to exempt some from regulation. That will be news to many foreign services with a modest Canadian presence or services that operate well outside the film and television streaming world. The likely result is that many services may choose to block the Canadian market entirely by refusing to accept Canadian subscribers, resulting in less consumer choice and higher costs for the services that remain in Canada and face higher compliance and regulatory costs. The blocking may be particularly acute for multicultural programming, leaving many Canadians without access to services they have come to rely upon.

Case Study Three

Jamar is a huge soccer fan. He loves to watch soccer from all over the world, including Canadian soccer. In order to feed his soccer addiction, Jamar subscribes to multiple streaming services to watch soccer from North America, South America and Europe.

Jamar's favourite streaming services could be impacted by Bill C-11. The government's legislation would force foreign streaming providers to adhere to cumbersome new registration and contribution requirements. These requirements are more intensive than practically any other key market the streaming services are trying to serve. Canadian subscribers may only make up a small percentage of these services' viewership. The streaming services may decide that the new regulations forced on the industry by the CRTC are so cumbersome that it simply isn't worth trying to maintain their presence within the Canadian market.

As a result, these streaming providers may simply block the Canadian market, meaning that anyone inside of Canada won't even have the opportunity to subscribe to these services and watch their favourite soccer teams from around the world.

How is the government through the CRTC trying to regulate expression as a "program"?

The expansive approach in Bill C-11 isn't limited to its jurisdictional reach. Not only does the law have few limits with respect to which services are regulated, it is similarly over-broad with respect to what is regulated, featuring definitions that loop all audio-visual content into the law by treating all audio-visual content as a "program" subject to potential regulation.

The Broadcasting Act defines a program as:

> *program means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text*[19]

Program is therefore broadly defined to capture any audio-visual content if it is not predominantly text. Bill C-11 then defines broadcasting as:

> *broadcasting means any transmission of programs – regardless of whether the transmission is scheduled or on demand or whether the programs are encrypted or not – by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place;*[20]

In other words, any transmission of programs (i.e., audio-visual content) for reception by the public is broadcasting. The definition of broadcasters (called broadcasting undertakings) has been expanded to cover internet services, which the bill describes as online undertakings:

> *online undertaking means an undertaking for the transmission or retransmission of programs over the internet for reception by the public by means of broadcasting receiving apparatus*[21]

This broad definition may include video streaming services such as YouTube or TikTok, podcast services such as Apple Podcast, and any other service offering up audio-visual content.

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19. Broadcasting Act, S.C. 1991, c.11, s.2(1).
20. Bill C-11, s 2(1).
21. Id.

Why is regulating expression as a broadcasting program through the CRTC so concerning?

All of this may sound technical, but the bottom line is that the starting point for regulation in Canada is all audio-visual content is now cast as a “program” under the Act. Rather than starting from the premise that Canada only regulates narrowly defined content as broadcasting, the bill starts from the opposite direction by regulating everything and swimming backward.

As a result, the bill moves toward the prospect of granting the CRTC massive power over expression with the expectation that the Commission will establish thresholds, limits or exemptions as appropriate.

However, when it comes to freedom of expression, regulation should be the exception, not the rule. This trust but don’t verify approach to the regulation of free expression is a dangerous and lacks the appropriate transparency.

Case Study Four

Jean and Marie are young university students in Quebec who are interested in the province’s separatist movement. They decide to start a podcast examining the history of separatist movements in Canada. They start with separatist movements from Nova Scotia during the early days of Confederation, Louis Riel’s movement in Manitoba in the 1870s and 1880s, Quebec’s separatist movement from the 1970s onwards, as well as recent surges in support for greater Western Canadian autonomy. Ultimately, they begin advocating for separatist movements.

Case Study Four continued

Under present Canadian content rules, this podcast could be labelled Canadian content. Should Bill C-11 be passed into law, the CRTC's Canadian content regulations may actually lead to the promotion of Jean and Marie's podcast online as Canadian content even though they want to break up Canada.

However, the story may not end here. The CRTC under Bill C-11 is being given the tools to promote certain content and deprioritizing other content in the process. As of right now, the CRTC's focus will be on promoting Canadian content. But things can change.

Bill C-11 should be seen as one component of the Trudeau government's new online regulatory agenda. Other bills, such as governing so-called online harms, are also on the government's agenda.

Public Safety Minister Marco Mendocino has argued that there is need for more content regulation for the sake of promoting "social cohesion," among others. Should that occur, the CRTC might then be given a mandate to filter out pro-separatist content like Jean and Marie's podcast on the basis of promoting social cohesion.

By allowing the CRTC to control discoverability for one reason – Canadian content – the door is left open for these tools being used for different reasons down the line.

What are the dangers of empowering the CRTC in this way?

Bill C-11 – when combined with other proposed legislation such as Bill C-18 – places the CRTC in an enormously powerful position. Despite limited expertise in the area and ongoing concerns about bias (including recent allegations that the Chair of the CRTC met privately in a bar with a senior executive of a company in the midst of regulatory hearings), it would determine how internet streaming companies must financially contribute to Canada and promote Canadian content on their services. These companies would be required to provide confidential corporate information to the CRTC and would be subject to audit. The CRTC would have new powers to levy fines in case of non-compliance.

Major new powers regarding the regulation of user generated content will also be handed over to the CRTC if the legislation remains unchanged. These important issues should be addressed in the legislative process,
not after.

Where is the policy direction?

Despite more than a year of debate on Bills C-10 and C-11, numerous questions about the application of the law remain unanswered. Indeed, the government has acknowledged that many specifics will be revealed as part of a policy direction to the CRTC. This direction could include details on exclusions from the scope of regulation, revisiting the definition of Canadian programs, tax credits policies for Canadian content, intellectual property policy, French language support, regulation of online broadcasters, and support for racialized groups. These are all issues framed as further measures that may be fodder for a policy direction.

During the Bill C-10 debate, the government responded to criticism about the lack of clarity in the legislation by publishing a draft version of the planned policy direction. However, for the purposes of Bill C-11, it now says that it will not release a policy direction until the bill receives royal assent. In other words, many issues will not be the subject of debates, hearings, or publicly available text. The approach is a significant retreat from the government's commitment to transparent lawmaking, leaving all stakeholders with little visibility about the full plans for broadcast and internet regulation in Canada. The government wants Parliament to empower the CRTC with intrusive new regulatory tools and claims it will simply offer the CRTC guidance as to how to apply those new tools later. Such an approach runs roughshod over the democratic process.

Conclusion

Bill C-11 is a deeply flawed piece of legislation. In fact, the government's own rationale for pushing the legislation is unsound. Canadian content, both at home and abroad, is thriving. Billions of dollars' worth of investment in Canadian content is being made by foreign streaming services around the world. All this new regulation and government intervention is not needed and, far from helping the industry, it could do more harm than good.

In addition, no other democratic nation regulates user generated content through broadcasting rules in this manner. Canada would be unique among allies in doing so, and not in a good way. Twitter, for example, has likened[22] parts of the government's regulatory agenda with approaches taken in authoritarian nations like China and North Korea. The government's own rules could also lead to Canadian content being deprioritized or blocked abroad and even risks making mainstream content more discoverable at home at the expense of content procured by digital-first Canadian creators due to outdated discoverability rules.

Finally, even if the government truly believes new regulations are needed, its determination to give sweeping new powers to the CTRC first and figure out how the CRTC should use all these new powers down the line is deeply problematic. If the government truly believes in its initiatives, it should clearly spell out exactly how any new powers given to the CRTC would be used before giving the CRTC any new powers. Prospective regulations should come first and not be treated as an afterthought, especially when free speech and free expression are on the line.

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22. Bill Curry, "Ottawa faces blowback for plan to regulate internet," *The Globe and Mail*, April 22, 2022.

While the government may be trying to hand the CRTC powers over determining whether content should be seen as Canadian or not today, it could very well broaden bureaucrats' mandate of promoting some content over others into more controversial categories tomorrow. Once a powerful new toolset has been created, it can always be repurposed for other projects.

The bottom line is that any benefits Canadian industry might gain from this legislation is heavily outweighed by the costs, both for industry and for individual Canadians.

Section IV

Podcast Transcript

Franco Terrazzano:

Hello everyone. I'm Franco Terrazzano, the federal director of the Canadian Taxpayers Federation. And of course, you're listening to the Canadian Taxpayers podcast where we're always pushing for lower taxes, less waste, and more accountable government. Now, today we're going to be talking about online censorship, government accountability, and I'm joined by a few awesome guests. I'm here, of course, with my friend and colleague in Toronto, Jay Goldberg. He is our Ontario director and spokesperson. He knows a lot about this issue, but we also have perhaps the best person joining us to have this conversation today in Canada, we're joined by Dr. Michael Geist. He is a law professor at the University of Ottawa and is seen as one of the foremost experts in the countries on legal issues surrounding the internet. And I also have to note that Dr. Geist was an advisor. He was very helpful on the report that we published on some of the dangers of Bill C-11. Professor Geist, thanks so much for coming on today.

Dr. Michael Geist:

Oh, pleasure. Thanks so much for having me.

Franco Terrazzano:

Well, let's get right into it, shall we? Dr. Geist, in a nutshell, what is Bill C-11, and why should Canadians be concerned about this?

Dr. Michael Geist:

Sure. It's a good place to start. And there's what Bill C-11 started life as, well, actually, originally is Bill C-10, and what it turned into. It started life as what I think some would say is a decently reasonable proposition that large streaming services like Netflix and Disney and some others might be treated as part of the broader Canadian broadcast system required to meet certain regulatory requirements and make contributions. I think there's an open debate about the need for legislation in that regard. Those companies are some of the biggest investors already in Canada, but certainly it's at least a debatable issue. Along the way, though, the legislation expanded in a way that initially the government said it wouldn't. But it is where it is, and that is that it expanded to include user content as well.

And if we go back just a little bit, there was initially Bill C-10, which actually directly excluded user content. The government then made the move to remove an exception that actually put it back on the table. That Bill died. They brought back this Bill. It gets complicated, but bottom line is when they brought this new Bill back, Bill C-11, they said we fixed the problem. We heard the concerns that people had about overstepping with respect to regulating user content. Yet the reality is, once you look at the fine print, once you listen to many of the experts that appeared before the committee, when you listen even to the head of the CRTC, I think at this stage, it is undeniable that there is some user content, and not just some, large amounts of user content. Virtually any TikTok video, for example, that includes music gets captured. All of which is subject to certain regulatory powers of the CRTC.

Franco Terrazzano:

Jay, can you just jump in there and really bring it home for our supporters on why they should be concerned about this?

Jay Goldberg:

Absolutely. Dr. Geist started to talk about issues of discoverability and user generated content. What he is talking about in part is about what we see on the internet as well. And so the major concern that we have is that the legislation is empowering the CRTC to decide what turns up first in your streaming feeds and your news feeds online. Now they're going to do that right now based on a Canadian standard. If something's considered to be Canadian, and that's open to interpretation, they'll push that. But what that means is that other content will become low on your list, buried, and you might not even see it. And we're concerned at the Taxpayers Federation, at least on my part, that in the future, this could be used to expand government power. That could be used to filter your content and prioritize certain content based on other priorities other than just Canadians. That's a huge concern.

Franco Terrazzano:

Professor, at least from the outside, I hear a lot of people arguing that the Bill might be needed to help promote the Canadian content producers. I want to know from you, do you think that the Bill in its current form is even needed to achieve stated objectives?

Dr. Michael Geist:

Yeah. Well, listen, there are a number of objectives. On the issue of discoverability, I think we should be distinguishing between two kinds of services really. And that's frankly, the way that the European Union does it and it's distressing that there's a ready example that was well studied that Canada could have relied upon, but chose not to. And in Europe they adopt an approach where they distinguish between what are known as curated services and non curated services. And so a curated service would be a service, let's say, like Netflix, that obviously decides what appears on the platform.

Now, in that sense, it's arguably more similar to a broadcaster than say is a YouTube or an Instagram or a TikTok where the content that appears there is really just a function of whatever the users themselves happen to be posting online. With respect to your question, do we need discoverability rules? When it comes to the curated services, the Netflixes of the world, I'm not convinced that there is a problem in need of solving. If you take a look, for example, at a service like Netflix, all you have to do is type in Canada into the search bar and you can find Canadian content. Could they be doing more to promote the Canadian content that they have on the service? They would respond that they're promoting to individual users, what those individual users are most likely to be interested in.

I don't know that the world would fall apart, though, if there was some requirement that there had to be a Canadian bar of Canadian content on Netflix. Where the problem really lies though, is in taking this concept and applying it onto the non curated services where it is user content. Because in that context, once you start saying you want YouTubes or TikToks or Instagrams to engage in that kind of practice, you run into a whole host of problems where, in fact, the approach can be harmful. If it isn't harmful in a Netflix context, it might be immaterial, but it's not harmful. In a YouTube context, it can create real harms to Canadian creators

who may find their content demoted on a global basis and even difficult to identify whether they qualify on a domestic basis.

Jay Goldberg:

Absolutely.

Franco Terrazzano:

Jay, let me just jump in right now because I tested this out before. One of my favorite shows, to no one's surprise, is "Trailer Park Boys." It took me about a minute to get off the computer, go to the TV, and find the "Trailer Park Boys," press play, and start watching an episode on Netflix. I was able to find that quite easily, but Jay, why don't you expand on this a little bit? What do you think? Do you think this Bill is needed?

Jay Goldberg:

Well, no, we don't. But I think something that Dr. Geist mentions, certainly we talked about in the report, is the profitability of the industry. The government is really trying to paint this picture of Canadian content creators that they're suffering, that in some way money's being lost in the industry before an investment in Canadian film and television is hitting record highs. In 2020, I believe, it was over $9 billion. One of the arguments the government made from the beginning is that this was needed to promote Canadian content because the industry was somehow in trouble, whereas the reality is that it's not, that they're making a record amount of money. And so that pokes a really big hole in one of the government's core arguments.

Franco Terrazzano:

I want to get back to this report because I love this report. And one of my favorite things about the report is that it shows that this isn't just a chalkboard issue, that this can really impact Canadians on their day to day lives. And we paint four different pictures on how Bill C-11 could impact Canadians. Jay, can you take us through some of the case studies here?

Jay Goldberg:

Sure. And I can ask Dr. Geist maybe to expand on some of them. Obviously, we wrote these case studies, or I wrote these case studies, ran them by Dr. Geist. These are hypothetical scenarios under Bill C-11 about what could potentially happen. The first case study we're looking at is a couple who are sitting down. They're trying to figure out what to watch on TV. As any of us who are married or in relationships know, sometimes that can be quite a struggle. The example that we put on the first case study is a married couple with the wife interested in watching "The Handmaid's Tale," which of course is based on Margaret Atwood's book, famous Canadian author. And what we were suggesting there is it might be difficult to find that because based on the outdated discoverability rules that we have here in Canada, that is not considered to be Canadian content for very specific reasons that Dr. Geist can speak to, production, where it's produced, who's involved, et cetera, et cetera.

And then we move on to the husband who's interested in watching a Maple Leafs documentary about their Stanley Cup run a couple of years ago. Again, that's considered not to be Canadian content. And as they keep going through and through, they're noticing content like "Gotta Love Trump," which is considered to be Canadian content simply because some production team members that were

Canadian. What we paint a picture of here is that actually in some cases, what we should be considering to be Canadian content is not, and it could be harder to see. Dr. Geist, I wonder if you could just expand on discoverability. You've certainly talked about this "Gotta Love Trump" thing before. How outdated is it? And should we be really looking to give further power to the CRTC if we're this outdated on figuring out what even is Canadian?

Dr. Michael Geist:

Yeah, I think this is an important issue worth discussing and, frankly, it's one of those issues where there is, I think, general agreement that the system, as it currently stands now, is in desperate need of updating. And you'll get pretty widespread agreement on that, really, from even people who are supportive of the bill will argue or acknowledge that there is a need to address the issue. I guess it's a little bit of question of timing. Do you need to address the issue before you start making dramatic changes to the system? Or can you make the dramatic changes and then at the same time, try to come up with some of the CanCon-related changes? But at its heart, part of the problem is that CanCon wants to do any number of different things or CanCon rules want to do any number of different things.

And it's not always clear whether or not any of those are particularly effective right now. And when you get those different policy objectives, there's a tendency for the whole thing to become a bit of an ineffective process, I think it's fair to say. And so part of it is the desire to so-called tell Canadian stories. That's I think how people most often identify Canadian content rules. And yet the reality as you highlight is that content that most would consider to be Canadian content, "Trailer Park Boys" is an example, you said that you watched it on Netflix. In fact, some of the new "Trailer Park Boys" that was completed and commissioned by Netflix is not treated

as Canadian content, even though you might think it would be. Why? Because Netflix is the owner, so it's actually not Canadian content.

The Amazon documentary on the Leafs so-called run, that would be a very short documentary because of Leafs run, is similarly not considered Canadian content once again, because it's foreign owned. In this case by Amazon. It highlights that things that sound like Canadian stories oftentimes aren't CanCon. The reason for that is that we have another policy as part of this, and that is that we want to ensure that Canadians own these works. And so on the one hand, companies like Netflix are accused of not investing in Canadian content. The reality is a lot more complicated than that. They actually do invest in a lot of productions that by virtually any measure qualifies as Canadian content. But for the fact that Netflix itself actually owns the work they commission, they decide they want to own and have that exclusivity on a global basis.

Our policy tries to say, well, that shouldn't count as Canadian content. Why? Because we want Canadians to own this. That raises some issues there. And then lastly, just to quickly wrap on this issue, there's another element to the policy, which is it's all about employment. We want to ensure that there's more economic activity in Canada. And that speaks to the point Jay made that the reality is we've seen record amounts of film and TV investment and production in Canada. Much of it is not traditional or treated as traditional Canadian content. But if the goal is employment, the goal is to try to ensure that Canada is the home for a lot of film and TV productions, it's succeeding there. Now, all this is to say, we've got a number of different policy objectives. The policy itself is not always doing a good job of meeting those objectives.

And it does seem to me that one of the things that we ought to be doing is sitting down and saying, okay, what are the core objectives? How do we ensure we've got a policy that's effective in that regard? How do we bring in a Netflix into our

system, and at the same time deal with this question of, well, if Netflix can't create any sort of Canadian content, how can they be viewed as a full participant in that Canadian system? I don't think they can. And I think that will ultimately require some real changes to the approach that we've got.

Jay Goldberg:

Yeah, it's very clearly outdated when you're speaking like that. And I think a lot of Canadians, when they're told that these productions are not considered to be Canadian are quite flabbergasted. And so the argument that the government's making here seems to be, we need more Canadian content, but a lot of what we would consider to be Canadian content isn't considered as such. And if the rules were loosened a little bit, you would end up seeing that a lot more is actually Canadian content. Just for our listeners, just to emphasize, so discoverability as a term is basically the ease with what you're going to see something online. When we talk about the government trying to push Canadian content up to the top of what you're going to see in your newsfeed or your streaming feed, that's discoverability. That's making something more discoverable. And so that's really what the core term is.

Franco Terrazzano:

Let me just jump in on that because I want to make sure that I'm understanding this correctly. And I think this is a very important point. If the government or if bureaucrats are going to prioritize one thing, they must be automatically deprioritizing something else. Is that one of the concerns here?

Jay Goldberg:

Absolutely. That's-

Dr. Michael Geist:

That is.

Jay Goldberg:

Sorry. Go ahead, Dr. Geist.

Dr. Michael Geist:

Yeah, no, I was going to say that is absolutely one of the concerns, especially when you start thinking of Canadian content outside the country. And so this requires a bit of thinking about how companies like YouTube make choices when it comes to some of the algorithms that they have and what gets displayed. Now, those companies incentives are quite clearly to ensure that users get more content that they're interested in. They try to basically determine that based on what you've viewed in the past. We all know that because if we click on a video that is different from the kinds of videos we typically watch, suddenly it starts appearing, at least in our recommendation feeds, for a period of time, just because YouTube's [00:15:28]. If you're interested in that prior one, you'll be interested in some other ones. Now, the problem with trying to import the traditional concept of discoverability into this world, especially for Canadian creators, has both a domestic position or domestic issue, but also even more international.

Domestically, the question becomes, how do you even identify what counts as Canadian, since many of these creators don't tick the right boxes for Canadian content, but even if we were to overcome that issue and decide, okay, we can identify this CanCon, the problem with showing people videos or other kinds of content that they're unlikely to really like, it's there not because they're habits suggest that it's something they're interested in, but rather because the policy says that you've got to promote Canadian content as part of operating in Canada, is that if people, when presented with those videos, don't click on them, or they don't watch them to completion, they just watch a little bit say, "That's not something that I'm interested in," and it's more likely that they're going to do that, that they're not going to click or not going to watch, because it's not the content that the company knows they're most likely to be interested in. It's there, at least in part, because of a regulatory requirement.

The problem here is that sends a signal to YouTube or TikTok or whomever that this is not content people like or are likely to click on because the algorithm picks up, not just on what you click on, but also content that you're presented with that you choose not to. And so if this becomes the kind of content that gets regularly presented to people that they don't click on, it'll continue to be presented in Canada, presumably because of some of these discoverability rules. But once you get outside the country, the message is this isn't great content. People, when presented with it, don't click on it. And so that actually will have the effect of demoting or at least relegating this content down the chain, so to speak, when it comes to how much it appears globally. And especially for Canadian creators, many of them will tell you that 90% or more of their views, of their revenue come from outside of the country. And so you're essentially trading some increased exposure in Canada for far less exposure globally. That's a bad trade for many of these digital first creators.

Jay Goldberg:

Absolutely. And Dr. Geist, you actually basically summarized our second case study here. We had said in the report that there's a gentleman living in Thunder Bay. He makes some podcasts about canoes. He wants to try to promote it online. He's seeing major uptick in viewership. An American company decides they might want to sponsor it, but then, of course, it becomes subject to all these rules that Dr. Geist just talked about. And if it, all of a sudden, becomes regulated, it could be over-promoted in Canada. You have lower click counts. And then around the world, the stuff that was previously doing well, just doesn't do well. And that's because it's being pushed on Canadians who don't actually want to watch it. And so then you have YouTube or whatever other companies are going to decide, well, this isn't very desirable content. T`hen you have Canadian content, the Canadian content that actually does worse around the world. And as Dr. Geist said, it's not a good trade off.

Let's get to our third case study here. The third case study is very interesting. We have a gentleman, we call him Jamal in the report here, big soccer fan or football, as many people would say in other areas. And he's subscribing to all these different streaming things online, but Bill C-11 would force streaming providers to potentially adhere to very cumbersome, new regulations, contribution requirements. They could be more intense than they are in virtually any other country, but the risk you have here is that these streamers decide Canada's just not worth it. There's too many rules, too many hoops for us to jump through. Let's just block the Canadian market all together. Dr. Geist are you able to speak to a concern such as that, that certain providers might just block Canada altogether, because they don't want to have to deal with all this regulation?

Dr. Michael Geist:

Sure. I'd be happy to. And I guess I'd start by noting I don't know that anybody would make the argument that the largest of the services, the Netflix or Disneys, are about to leave the country.

Jay Goldberg:

Right.

Dr. Michael Geist:

I don't think they are. They've made big investments in this country and they're quite clearly generating revenues and such. They're very likely to stick around. The problem here is that we don't know what kind of thresholds might be established when it comes to this legislation to know which kind of services are included or excluded. At the moment, everybody is included. Now the government has said that's not their intent. I actually engaged in a bit of a Twitter debate with one of the policy officials-

Jay Goldberg:

Yeah.

Dr. Michael Geist:

... Within the government recently. Insisted that this would only apply to the largest services with hundreds of thousands of subscribers. Reality is that's not what the

legislation says right now. It's possible that the CRTC could establish that as its standard, but we don't know and it's going to take a very long time before we get to the point where we do know. For many of the smaller, more niche services that may have very active following in Canada, but a smaller number of subscribers and smaller revenue, they may find themselves with the tough choice of deciding whether or not it pays to continue to remain in the Canadian market. Canada might be one of 100 different markets that they operate in.

It's one that the costs of doing business due to some of these regulatory requirements become more significant, and they may take a look at, and they may say, "Well, either we want to ensure that we're below whatever threshold gets established," in which case they continue to operate, but they may increase prices because they're going to artificially keep the number of subscribers they have low to ensure that they remain within the threshold. Those that remain will pay more as the company seeks to increase the amount of revenue that it has, or they may simply decide that Canada's just not worth the trouble, that the number of subscribers they have isn't worth the associated costs from a regulatory perspective. In which case, perhaps, they license the content to existing services or Canadians simply don't have that choice anymore.

Either way, it does seem to me that there is a real risk that we could get services that a lot of Canadians do rely upon, especially in multicultural communities where they want to stay in touch with other communities around the world and are actively seeking out this kind of content, they may find that those services either are costlier in Canada due to some of the regulatory costs associated with operating here or the thresholds that get established, or they may find that those services begin to block Canada altogether. Now, this is, of course, not unheard of. We have services already that block Canada. Hulu is a good example. Very well known, large US service that blocks the Canadian market. It's technically capable.

The capabilities are quite clearly there to block. And this legislation does run the risk of creating incentives for some of these companies or at least a framework for some of these companies to say "Canada has become too costly. It's not worth the trouble." And so we get less choice as a result of this legislation, not more.

Jay Goldberg:

Right. And Dr. Geist makes a point about the Twitter spat. One of the things the government is trying to tell us is take the package now. We're going to have regulations that will narrow the scope in the future, but we're only going to tell it to you once it's passed into law and signed by the governor general. And of course, that's not acceptable. We need to see every piece of the regulatory guidelines, potential regulatory guidelines, before it gets into law, not after. As we've said before, as I've said before, that's absolutely backward governance. It's like trying to sell someone a used car without actually letting somebody into the used car to inspect anything there or to look at the mileage or anything like that. That's a very important point. To the last case study, we are suggesting a podcast on separatism.

This is a very hypothetical one. Basically, what we suggested that there's a couple people in Quebec that are making a podcast on the history of separatism. For right now, this would be considered Canadian content, produced in Canada. Obviously, it's a Canadian topic, et cetera, et cetera. But Minister Mendicino has come out, and this is public safety minister, has suggested that in the future, we might have to increase regulations to promote things like social cohesion, he uses these words, or the government might come up with other reasons why it might want to filter or prioritize what we see online. Right now, this podcast would potentially be considered Canadian or should be considered Canadian, but down the line, who knows. And this just really leaves open the question of if there's content that the

government doesn't really consider to be Canadian, in this case, it's criticizing the existence of Canada in some ways, this is potentially down the line, something that could be touched on.

Again, it's not on the current bill. Right now, they're focusing on the Canadian narrative, but they're building this machine here where the CRTC through new government powers can filter what we see, meaning they push what they want us to see. And inherently, as Dr. Geist said, demote what other things we do see. And it is possible that the government could use that in the future for other reasons. That wraps up the four case studies that we were engaging in. And I guess I can throw it back over to Franco to have some more questions there.

Franco Terrazzano:

Yeah. I do have a few more questions. The next one is about process. Look, it seems to me that with previously Bill C-10 and now Bill C-11, that the government is really trying to ram this through Parliament, right? That's at least what it looks like to me as an observer from the outside. Professor Geist, a bit of a process question for you, but do you share these concerns that there really hasn't been proper consideration, perhaps proper consultation on this whole process?

Dr. Michael Geist:

I think there's certainly been some problems with it. Most notably towards the end of the Heritage Committee study in particular, I think is where there was real problems. Listen, this time, unlike the last bill where there was really virtually no serious hearings in terms of trying to bring in differing perspectives, this time, it was very condensed in terms of the time allocated towards it, but there was at

least a diversity of views. Both myself and Jay had both had a chance to appear before the committee. I will say though, that one of the concerns, I think, a lot of people have is what took place after the witnesses. And so that's typically known as a clause by clause process where the committee will go through each clause in the bill. There's the opportunity to raise potential amendments, to debate it, to ask questions of department officials so that you understand the implications of these proposals.

That can be sometimes a bit of a lengthy process, but that's really where after all the witnesses have had their say, and there's been the submissions, you're really working towards trying to make this bill a better bill. And the approach that the government had was they cut off the witness debate and said, "We need to move directly to clause by clause." You can make the case that it was time to move on to clause by clause, I think. But once they got to clause by clause, there was no real deadline. There was no reason not to engage in a fulsome process reviewing these clauses. And what we ended up with instead was one day allocated towards it. And under the motion that was adopted by the House of Commons, promoted by the government was, they said, "Listen, you get this one day. If you haven't completed clause by clause by 9:00 PM, at that point in time, there's no more debate." You simply say what is the amendment, just by number, no details, no opportunity even to read the amendment and you vote. That's it. No debate. No discussion. No even public disclosure about what they were voting on. And they did that on over 100 potential amendments as they raced this through to get it passed in the House of Commons.

Now, the bills at the Senate, there is an opportunity in the fall, I think, for the Senate to conduct I think, serious hearings and to essentially take a closer look, even at some of the amendments that were made as well as those that were not, and perhaps make some further changes to the legislation. There's still an opportunity, but that House process, I think, was really deeply disturbing.

As I say, there was no deadline here. This was simply an attempt that seemed like to get this through the House before the summer. And low and behold, soon afterwards, once we got to the Senate, we had acknowledgements from the chair of the CRTC that concerns around algorithmic regulation actually were more legitimate than the government had suggested. We had the CRTC issuing a decision involving Radio Canada, which does raise the specter of content regulation. And so suddenly, the fact that we moved so quickly when we started to see almost immediately developments that should be factored into considering how this legislation turns out, I think ultimately leaves a pretty bad taste. And the Senate is still positioned to try to address some of those issues, but the way that it ended, particularly in clause by clause was, I think, deeply troubling.

Jay Goldberg:

Absolutely. It was deeply troubling. And I was right there near the end of the Heritage Committee testimony, where I was able to give some testimony, but before any of the questions, the Liberal MPs and then the NDP as well, tried to just end the hearing. And it was basically an hour, hour and a half of absolute chaos and nothing was accomplished. And myself and the other three witnesses were not able to answer fully any kind of questions, which is what the process is supposed to be. And it just seemed, as Dr. Geist said, that they were trying to rush it through. Now, one of the things I mentioned at the committee was user-generated content. And so this is a controversial issue because user-generated content, as we've said, is what individuals, like you or me, post online, post on YouTube, on TikTok.

And there's a real concern about that potentially being regulated. The government has said it won't be, but the head of the CRTC says it will be. And so we actually have a clip that we're going to play of the head of the CRTC saying, "Yes, user

generated content is on the table." There you have it, Ian Scott saying exactly that, user generated content, it will be on the table. And so the government suggesting that it won't be regulated, that's certainly not the case. I talked a little about my committee experience, the chaos that we had there. Franco, I think I'll hand it back to you for some final thoughts.

Franco Terrazzano:

Yeah. Well, I just have one more question for both of you each. Look, maybe I'm a little bit more skeptical about government powers than the average Joe, but to me, there seems to be a slippery slope here. Professor Geist, I'd like to know what you think, what precedent, if any, does this give government for the future? And also, are there any other bills that may exacerbate the issue of online censorship?

Dr. Michael Geist:

Yeah, there's a lot there. Listen, I have concerns with what the government had to say. Respectfully, Jay, I don't think it's just a Liberal and NDP issue with committee, frankly. The Conservatives were engaged in some of the same activities and so were the Bloc. The reality is that I thought that once we saw what took place at the Senate, even though it was only over the course of a couple days, we actually saw what good committees could actually function like, where they actually did listen to questions, ask real questions, and not engage in all sorts of posturing, which I think took place really, frankly, from just about all the MPs on all the side, which was unfortunate. I think though, you asked the question about how does this play in more broadly and this is part of a broader legislative initiative from the government.

This C-11 is really just the first piece of a larger plan that includes Bill C-18, which is legislation that deals with the media and which I think raises some additional concerns around links and access to information online and the approach that the government has with mandated payments effectively for linking or even inclusion in search indexes by some of the large internet platforms. Nobody's feeling bad for the financial position of those large platforms, but establishing a precedent that links are compensable or that there's compensation, even for inclusion in a search index, I think raises some serious, longer term concerns. And then there's the issue around online harms or the government is now calling online safety. They put out a consultation that generated a lot of criticism. They said they were going to go back to the drawing board, had an expert panel take a look at some of those issues.

We'll wait to see where the government lands with new legislation, but quite clearly, it's a potentially very divisive issue that will raise many speech related issues. And listen, when I appeared before the Senate, my view was that this particular legislation has less implications for what I can say. I don't believe that this legislation stops anybody from saying anything they want, but it definitely has implications for the way I can be heard. And we look at other legislation, it can have some of that same effect and even potentially get into the ability for people to speak, especially if we look at some of the recent CRTC decisions, the most recent one involving Radio Canada, which started to implicate some of those questions around the regulator making decisions, not just about how things get promoted, but what things get broadcast or made available as well.

Franco Terrazzano:

Jay, I'd be interested to hear if you have any long term concerns there.

Jay Goldberg:

I do. And I think Dr. Geist outlined a number of them and the core of it is, as we said, not just being able to talk, but to be heard. And so that's the really concerning issue. And if the government or government regulators are able to influence whether we can be heard or the degree to which we can be heard, that's a very dangerous thing, I think, in a democracy. I would also say that the government's giving a heck of a lot of powers to the CRTC through this, which is the broadcasting regulator, through this bill. They're intending to give a lot of power over to them. Again, to give the CRTC the power.

Right now, just based on Canadianness, but to give them the power to promote certain content, which inherently demotes others. And so what I'm concerned about long term is it could be this government, it could be another government. It could be next year, it could be in 10 years. But if you're giving the power to the CRTC to be able to order what we see, there's a real concern that it could be expanded to other areas and not just kept to "Canadian content." That's a huge concern for me going forward, but I think the biggest point is absolutely, it's not just a question of being able to talk. It's a question of being able to be heard. And that is the clear concern.

Franco Terrazzano:

Well, you know what, I think we could spend about a week diving into the details of this piece of legislation and other issues of online censorship, but let's leave it there. And on that note, Dr. Geist, I just want to say thank you so much for joining the podcast and sharing your expertise with us. And you know what, let's talk to our supporters now, because we're all about taking action. We need our CTF supporters to take some action. The bill is in the Senate. From what I'm hearing,

the talk around town here in Ottawa is that this piece of legislation could be passed some time in the fall. We don't have too much time, but there is still time for action. And there's a few things that you can do. We have an online petition that you can sign. Stand with your fellow taxpayers against online censorship. Now, after you sign that petition, of course share this podcast with your friends and family so more people understand the nuances and the dangers of this piece of legislation. And hey, while you're at it, type up that email. Give your MP an earful.